

II. Rejections under 35 U.S.C. § 103

A. Mougin et al.

Claims 36-42 and 44-74 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,945,095 (Mougin et al.). Office Action at pp. 3-5. Applicants respectfully traverse this rejection.

The Examiner cites Mougin for teaching a cosmetic composition comprising "a dispersion of surface-stabilized polymer particles in a liquid fatty phase." *Id.* at p. 3. The Examiner admits that Mougin does not disclose pigment and filler particles in a colloidal dispersion or "stabilizing the particles in the colloidal dispersion with a dispersant." *Id.* at p. 4. According to the Examiner, "it is considered within the skill in the art to use pigment and filler particles in micrometer size in the dispersions thereby obtaining a colloidal dispersions of the pigment and/or filler particles." *Id.*

Applicants respectfully disagree. The Office has the initial burden to establish a *prima facie* case of obviousness. See, M.P.E.P. § 2143. To meet this burden, there must be some objective teaching in the prior art, coupled with the knowledge generally available to one of ordinary skill in the art at the time of the invention, that would have motivated one of ordinary skill to combine reference teachings with a reasonable expectation of success in obtaining the claimed invention. See, M.P.E.P. § 2143.01; 2143.02.

Mougin uses a dispersion of polymer particles to camouflage "wrinkles and fine lines." Col. 1, lines 58-63. Mougin provides no suggestion or motivation to add to the composition a colloidal dispersion comprising particles, as claimed. Mougin does not teach a colloidal dispersion comprising particles that are stabilized with at least one

dispersant in combination with a dispersion comprising polymer particles that are surface-stabilized, as claimed. Without any teaching that the particles are unstable in the claimed composition, one of ordinary skill in the art would not have been motivated to stabilize the particles with at least one dispersant.

The Examiner bases the rejection on common knowledge without evidentiary support for this common knowledge, i.e., that it is "known in the art to use particles in micrometer size in order to obtain more even dispersion and more stable compositions." See Office Action at p. 4. Applicants contend that this is an overbroad generalization because the mere addition of micrometer-sized particles does not in itself guarantee a "more even dispersion" or "more stable composition." Moreover, the Examiner does not support this statement by any evidence of record, as required to establish a *prima facie* case of obviousness. See *In re Lee*, 377 F.3d 1338, 1345 (Fed. Cir. 2002). ("Thus when [the Board relies] on what they assert to be general knowledge to negate patentability, that knowledge must be articulated and placed on the record.").

Even if the mere addition of micrometer particles would result in a more even dispersion and stable composition when added to Mougin's composition, as suggested by the Examiner, there must be evidence of a suggestion or motivation for modifying Mougin's composition, not just any dispersion. "The need for specificity pervades this authority." *In re Lee*, 377 F.3d at 1343. Without such suggestion or motivation, a *prima facie* case is not established.

Accordingly, Applicants respectfully request withdrawal of this rejection.

B. Mougin et al. and DE '062

Claims 36-74 are rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,945,095 (Mougin et al.) and the abstract of DE 196 43 062 (DE '062). Office Action at pp. 5-6. Applicants respectfully traverse this rejection.

Mougin is discussed above. The Abstract of DE '062 is cited for teaching "that pigment dispersions in an oil phase are stabilized with Applicant's preferred dispersants, poly-12-hydroxystearates for use in cosmetics." *Id.* at p. 5. According to the Examiner, it "would have been obvious ... to prepare the composition of US '095 using stabilized pigment dispersions as taught by DE '062 to obtain cosmetic compositions without pigment sedimentation. *Id.* at pp. 5-6.

Applicants submit that the combination of references is improper. The Abstract of DE '062 teaches the use of specific pigment dispersants. There is no rationale offered, however, for concluding that it would have been obvious to use the "stabilized pigment dispersions as taught by DE '062." Although avoiding pigment sedimentation is generally desired, there is no suggestion or motivation to add the claimed colloidal dispersion to Mougin's composition in the first place. Mougin teaches that its polymer dispersion works well for camouflaging wrinkles. Thus, avoiding pigment sedimentation does not provide the requisite suggestion or motivation to add the dispersion of DE '062 to Mougin's dispersion. Absent such suggestion or motivation, the *prima facie* case of obviousness fails.

In addition, the introduction of pigments, nacles, and fillers in the form of a dispersion stabilized with a dispersant makes it possible to limit the flocculation of the polymer particles. Neither of the cited references address the problem of flocculation of

the polymer particles during the direct introduction of the pigments, nacles, fillers, and mixtures thereof. For at least this additional reason, the claims are patentable over the cited references.

Accordingly, Applicants respectfully request withdrawal of this rejection.

III. Conclusion

In view of the foregoing remarks, Applicants respectfully request the reconsideration and reexamination of this application and the timely allowance of the pending claims.

If there is any fee due in connection with the filing of this Preliminary Amendment, please charge the fee to our Deposit Account No. 06-0916.

Respectfully submitted,

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